UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ASHLEE and RUBY HENDERSON, a married couple and L.W.C.H., *et al.*, Plaintiffs, vs. DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner, *et al.*, Defendants.	)	
	)	No. 1:15-cv-220-TWP-MJD
NOELL and CRYSTAL ALLEN, a married couple, *et al.*, Plaintiffs, vs. DR. JEROME M. ADAMS, in his official capacity as Indiana State Health Commissioner, *et al.*, Defendants.	)	

REPLY MEMORANDUM OF STATE DEFENDANT AND DEFENDANTS OF BARTHOLOMEW, MARION, AND VIGO COUNTIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Pursuant to Fed. R. Civ. P. 56(a) and S.D. Ind. L.R. 56-1, the following Defendants, by counsel, respectfully submit this Reply Memorandum in Support of their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment: Dr. Jerome M. Adams, Dr. Virginia A. Caine, Darren Klingler, Dr. James Miner, Gregory S. Fehribach, Lacy M. Johnson, Charles S. Eberhardt II, Deborah J. Daniels, Dr. David F. Canal, Joyce Q. Rogers, Dr. Brian Niedbalski, Collis Mayfield, Beth Lewis, Dennis Stark, Dr. Michael Chadwick, Dr. Susan Sawin-Johnson, Michael Meyer, Dr. Charles Hatcher, Dr. Brooke F. Case, Cindy Boll, Jim Reed, Dr. Darren Brucken, Joni Wise, Terri Manning, Jeffery Depasse, Dora Abel, Dr. Irving Haber, Brian Garcia, Michael Eldred, Dr. James Turner, and Dr. Robert Burkle ("Defendants").

ADDITIONAL STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

This court consolidated *Allen v. Adams*, No. 1:15-cv-01929, into this case on February 8, 2016. ECF No. 96. The Statement that follows concerns only the newly added *Allen* plaintiffs.

Noell and Crystal Allen were married on November 22, 2013, and sometime thereafter, Crystal Allen was artificially inseminated with donor sperm. ECF No. 100-1, Affidavit of Noell & Crystal Allen, at 1–2 [hereinafter "Allen Affidavit"]. The record does not reflect whether the donor was known or anonymous, nor whether he purported to waive his parental rights. On November 21, 2015, she gave birth prematurely to twins, and they passed away that same day. *Id.* at 2. Crystal, as the children's birth mother, was listed on their birth certificates, but Noell was not and would like to be. *Id.*

Jacqueline and Lisa Phillips-Stackman were married on October 4, 2015. ECF No. 100-3, Affidavit of Jacqueline & Lisa Phillips-Stackman, at 1 [hereinafter "Phillips-Stackman Affidavit"]. Using Jackie's egg and a known donor's sperm, an embryo was created and implanted in Lisa, who gave birth to L.J.P.-S. on October 21, 2015. *Id.* at 2. Thus, Jackie is the biological mother, but Lisa is the birth mother and thus the "presumed" biological mother under Indiana law. *See* Ind. Code § 31–9–2–10 (defining, in relevant part, a "birth parent" to be "the woman who is legally presumed under Indiana law to be the mother of biological origin"); *see also Adoptive Parents of M.L.V. v. Wilkens*, 598 N.E.2d 1054, 1059 (Ind. 1992) ("[A] mother's legal obligations to her child arise when she gives birth."). The donor purported to waive his parental rights. ECF No. 100, Plaintiffs Response to Defendants' Cross-Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment [hereinafter "Pls.' Reply"] at 22. Jackie was not listed on L.J.P.-S.'s birth certificate but would like to be. Phillips-Stackman Affidavit at 3.

ARGUMENT

I. Plaintiffs' Assorted Procedural Objections to Defendants' Presentation Are Meritless

A. Defendants' interrogatory responses in no way impede legitimate and compelling government interests responsive to Plaintiffs' legal arguments

Plaintiffs contend that State Defendants' compelling governmental interest in identifying and vesting legal parental rights in a child's biological father is somehow not "genuine" because it was not asserted in response to Plaintiffs' interrogatories. Pls.' Reply at 13–14. But those interrogatories were not directed at discovering the compelling governmental interest behind the challenged statutes; rather, they sought the governmental interest in:

- "denying a presumption of parenthood to Same-sex spouses of Birth Mothers[,]"
- "placing the name of a Birth Mother's husband on the birth certificate of a child in the event that all parties know that husband is not the biological parent of the child[,]"
- "having a husband of a Birth Mother being presumed the father in a situation whereby artificial insemination is by an anonymous sperm donor using private facility and medical doctors but not when a Birth Mother is married to another woman whereby the artificial

insemination is by an anonymous sperm donor using private facility and medical doctors[,]" and

- "declaring on a child's birth certificate that the husband of the Birth Mother is the father of the child when in actuality, the husband is not the biological parent of the child and the child was conceived by artificial insemination with an anonymous sperm donor using a private facility and medical doctors."

ECF No. 79-17, State Defendant's Responses and Objections to Plaintiffs' First Set of Interrogatories [hereinafter "State Defendant's Responses and Objections"] at 8-9, 11. The challenged statutes do none of these things, so there is no reason that State Defendant would have proffered the compelling governmental interest behind them in response to those questions.

What is more, State Defendant did not answer these interrogatories, but rather objected to them. *See* State Defendant's Responses and Objections at 8-9, 11. Plaintiffs did not challenge those objections or seek any further discovery from State Defendant (or any other Defendant). Nor do Plaintiffs allege any prejudice from State Defendant's objections or subsequent assertions of compelling state interests in their summary judgment brief. There is no reason for this court to "disregard[ ]" the State's interest. Pls.' Reply at 14.

B. Defendants' "Statement of Material Facts Not In Dispute" is valid

Plaintiffs claim that Defendants' "Statement of Material Facts Not In Dispute" in their opening brief "cites only to the Indiana Code, the Administrative Code and case law" and "failed to provide actual facts[.]" Pls.' Reply at 5, 6. Not so; that section of Defendants' brief contains numerous citations to exhibits, including Plaintiffs' own discovery responses, as well as citations to relevant statutes and case law. *See* ECF No. 85, Memorandum of State Defendant and Defendants of Bartholomew, Marion, and Vigo Counties in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment [hereinafter "Defs.' SJ Br."] at 9–13. Thus, Defendants have complied with Local Rule 56-1, which requires a brief in support of a motion for summary judgment to "include a section labeled 'Statement of

Material Facts Not in Dispute' containing the facts: (1) that are potentially determinative of the motion; and (2) as to which the movant contends there is no genuine issue."

The distinction between fact and law is sometimes blurry, as the existence of law is a fact in itself. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (acknowledging that no rule or principle will "unerringly distinguish a factual finding from a legal conclusion"). District courts often say that "[a]ny finding of fact that is more properly considered a conclusion of law" shall be treated as such, and vice versa. *Drake v. United States*, No. 1:13-CV-0961-TWP-DML, 2015 WL 9480038 at *1 (S.D. Ind. Dec. 29, 2015). Here, the relevant facts can be understood only in the context of statutes and cases, so there is no benefit from a rigid factual and legal separation.

Finally, Plaintiffs take particular issue with Defendants' citation to Indiana Code section 31-9-2-88, which defines "parent," arguing it applies *only* "for purposes of the juvenile law." Pls. Reply at 5–6. Article 31-9 definitions apply throughout Title 31 "[e]xcept as otherwise provided[.]" Ind. Code § 31-9-1-1. It makes sense to apply the statutory definition of "parent" throughout title 31, as the term arises frequently in other contexts. *See, e.g.*, Ind. Code §§ 31-16-17 (establishing a child's duty to support an indigent parent); 31-25-3-2 (establishing the state parent locator service for child support purposes). And courts do so apply it. *See, e.g.*, *C.M.L. ex rel. Brabant v. Republic Servs., Inc.*, 800 N.E.2d 200, 207 (Ind. Ct. App. 2003) (characterizing Indiana Code section 31-9-2-88 as "defining 'parent' for *family and* juvenile law purposes as the biological or adoptive parent") (emphasis added).

C. The Carnes Declaration is relevant and was made upon personal knowledge

Plaintiffs also ask the court to strike or ignore portions of Defendants' Exhibit 1, the Carnes Declaration, and its Attachment 2, an article discussing paternity misattribution. Pls.' Reply at 26–30. These evidentiary submissions establish that the marital presumption of paternity is correct in over 99% of cases. ECF No. 85-1, Declaration of Brian Carnes in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion for Summary Judgment [hereinafter "Carnes Declaration"] at 3 (citing Attachment 2). Plaintiffs offer no controverting evidence, but argue Defendants' evidence is irrelevant and the affiant's statements lack personal knowledge. Pls.' Reply at 26–30.

First, Plaintiffs claim the statistical accuracy of the marital presumption "is irrelevant because it does not matter how many children are actually biologically related to the husband of the birth mother." Pls.' Br. at 27. Indeed, the State is not required to show accuracy of the presumption of biological parentage. Yet the existence of at least one study substantiating it provides reassurance that the presumption generally serves a useful end. And in the event the State must meet the burden of strict scrutiny, the declaration and article demonstrate that the presumption nearly always identifies correct biological fathers, such that it provides a narrowly tailored means to achieve a compelling state interest. Any complaints about the article's persuasive value (Plaintiffs take issue with its scope, focus, technical nature, and methods, Pls.' Reply at 27–28) go to its weight, not its admissibility. *Adams v. Ameritech Servs.*, Inc., 231 F.3d 414, 425, 428 (7th Cir. 2000) ("[C]riticisms of . . . statistical evidence" "went to the weight of the evidence . . . not to its admissibility.").

Second, the declarant is Brian Carnes, the Indiana State Registrar and Director of Vital Records at the Indiana State Department of Health. He stated in his declaration that he was "aware of" the study, Carnes Declaration at 3; thus, its *existence* is a fact within his personal knowledge, and he need not be an expert to declare that fact. *See, e.g.*, *Albritton v. CVS Caremark Corp.*, No. 5:13-CV-218-TBR-LLK, 2015 WL 4598982, at *9 (W.D. Ky. July 30, 2015) ("[S]tatistics themselves do not require an expert, per se, to enter into evidence."). To the extent Carnes has offered his own opinion of the presumption's general accuracy in Indiana, it is based upon his own personal knowledge and is permissible. *See* Fed. R. Evid. 701 Advisory Committee Notes, 2000 Amendments (noting that a lay witness who has "particularized knowledge . . . by virtue of his or her position" may testify regarding that knowledge).

II. The Wedlock Statutes Have No Relevance to Plaintiffs, as They Appear to Concede

Plaintiffs concede the Wedlock Statutes do not "impact the legal rights of Plaintiffs' children," yet continue to challenge their constitutionality because they "impose stigma by implying that the Plaintiffs' marriage[s] are not sufficiently enough a 'marriage' to make the resulting children 'legitimate.'" Pls.' Reply at 19 n.4. The lack of any legal injury visited by the statutes means both that Plaintiffs lack standing to challenge them and that they impose no unconstitutional burdens.

1. In support of their challenge to the Wedlock Statutes, Plaintiffs have cited two cases: *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994) and *Engelking v. Engelking*, 982 N.E.2d 326 (Ind. Ct. App. 2013). Both center on whether a child conceived through artificial insemination with donor sperm is a "child of the marriage"—but neither discusses the Wedlock Statutes. Plaintiffs claim they are nonetheless relevant because "[t]here is no substantive difference between a 'child of the marriage' and a 'child born in wedlock' as both are identical and the benefits and obligations of parenthood flow from either." Pls.' Reply at 21 n.7. Not so; the term "child of the marriage" includes all "children . . . born or adopted during the marriage of the parties[,]" *Russell v. Russell*, 682 N.E.2d 513, 515-16 (Ind. 1997) (quoting Ind. Code 31-9-2-13(a)), but the term "child born in wedlock" does not include "a child born into an intact marriage but fathered by a man other than the husband[.]" 5 Ind. Law Encyc. Children Born Out of Wedlock § 1 (citing *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996)). In other words, "[a] determination as to whether a child is a child of the marriage in a dissolution proceeding is not

necessarily a determination that the divorcing husband is the biological father of the child." *Russell*, 682 N.E.2d at 518.

Plaintiffs cite *Estate of Lamey* to support their misapprehension, but that case simply stands for the proposition that a third party has no standing to contest a presumed father's paternity of a child unless that third party is himself a putative father of the child. *Estate of Lamey v. Lamey*, 689 N.E.2d 1265, 1268 (Ind. Ct. App. 1997) ("Uncle is wrong in assuming that, by virtue of petitioning the court to determine heirship, he has automatic standing to petition the court to order paternity blood testing for a child for whom he is not also asserting his own paternity."). That conclusion is consistent with Indiana's statutory authorization for actions to establish paternity. *See* Ind. Code § 31-14-4-1 ("A paternity action may be filed by the . . . mother or expectant mother" or a "man alleging that: (A) he is the child's biological father; or (B) he is the expectant father of an unborn child.").

Estate of Regalado makes the distinction between "child born in wedlock" and "child of the marriage" crystal clear: "Under Indiana common law, the term wedlock refers to the status of the biological parents of the child in relation to each other." 933 N.E.2d 512, 522 (Ind. Ct. App. 2010) (citing *K.S. v. R.S.,* 669 N.E.2d at 402). "[A] child is born out of wedlock if: (1) the mother is unmarried when the child is born or (2) the mother is married when the child is born, but the mother's husband is not the child's biological father." *Id.* (citing *K.S. v. R.S.,* 669 N.E.2d at 402). Thus, a child can be a "child of the marriage" *and yet not* a child born in wedlock; indeed, that is exactly the situation that occurred in both *Levin*, 645 N.E.2d at 605, and *Engelking*, 982 N.E.2d at 328.

The bottom line is that *Levin* and *Engelking*—much less *Estate of Lamey*—do not render the Wedlock Statutes operational beyond adoption consent issues, which do not arise here.

2. What is more, mere "stigma" does not rise to the level of a cognizable injury. *O'Gorman v. City of Chicago*, 777 F.3d 885, 891 (7th Cir. 2015) ("It is well-established that an individual does not have any cognizable liberty interest in his reputation, and therefore mere defamation by the government does not deprive a person of liberty protected by the Fourteenth Amendment . . . [unless] paired with the alteration of legal status[.]"); *see also Paul v. Davis*, 424 U.S. 693, 701 (1976) (noting that notwithstanding "the frequently drastic effect of the 'stigma' which may result from defamation by the government[,] . . . reputation alone, apart from some more tangible interests such as employment, is" not "sufficient to invoke the procedural protection of the Due Process Clause"). Nor is this case similar to cases in which courts concluded that state marriage definitions imposed substantive legal burdens on same-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("[L]aws excluding same-sex couples from the marriage right impose stigma *and injury*") (emphasis added); *Baskin v. Bogan*, 766 F.3d 648, 658 (7th Cir. 2014) (noting that such laws denied plaintiffs "considerable[,]" "tangible . . . benefits of marriage").

If the "stigma" that plaintiffs allege arises from the Wedlock Statutes were sufficient to confer standing to challenge them, Article III would no longer impose a meaningful restraint on federal court jurisdiction. Anyone who felt "stigmatized" by a statute could demand it be invalidated to relieve that "stigma"—regardless of real-world legal implications. Article III precludes such symbolic litigation. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them.") (internal quotations omitted).

Put another way, because the Wedlock Statutes have no operational impact on Plaintiffs, it is impossible to mount a defense of them. Plaintiffs do not want them to apply, and they do not, end of story. Plaintiffs' due process challenge to the Wedlock Statutes must accordingly fail for lack of federal jurisdiction.

III. This Court Should Apply Rational Basis Review to Plaintiffs' Remaining Claims

Plaintiffs contend this court should apply "[h]eightened scrutiny" to their claims because they "are being discriminated against on the basis of sexual orientation and gender." Pls.' Reply at 7. But the challenged statutes are facially neutral, so heightened scrutiny is inappropriate. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (rejecting the notion that "a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another").

Plaintiffs cite *M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996), for the proposition that when a law "is not merely disproportionate in impact," but "visit[s] different consequences on two categories of persons," "heightened scrutiny is to be applied." Pls.' Reply at 8–10. First, *M.L.B.* is a "heightened scrutiny" case only because a long-established fundamental right—biological parentage—was at stake, not because the rule at issue created a particular classification. *M.L.B.*, 519 U.S. at 115–16 (noting that Equal Protection challenges to court costs are normally reviewed for "rational justification" but in the context of termination of parental rights, "close consideration" is warranted). No such fundamental right exists here; if anything, Plaintiffs are attempting to erode biological parental rights. Second, *M.L.B.* says only that a statute that coheres to a particular classification in all applications creates facial discrimination. *Id.* at 126–27. Specifically, a prohibition of pauper's appeals was not "neutral on its face" because it did not simply "affect a greater proportion" of poor people than others, but instead applied to *all* poor people and did "not reach anyone outside that class." *Id.* at 135, 137.

1. With respect to birth certificates, *M.L.B.* is inapposite because the Indiana Birth Worksheet makes no classifications based on either sex or sexual orientation. The Worksheet asks each birth mother: "Are you married to the father of your child?" When a birth mother answers "no," "no one's name other than the birth mother is listed as a parent on the birth certificate. A birth mother who knowingly gives an untruthful response to Question 37—or indeed any of the questions on the Worksheet—could be prosecuted for fraud." Defs.' SJ Br. at 10 (citations omitted). Plaintiffs have claimed that the State "allow[s]" birth mothers to lie on the form, *see, e.g.*, Pls.' Reply at 6, 10, 11, but have cited no evidence in support of that assertion, so the court should disregard it.[1]

As ostensible support for their allegation that the State permits or even encourages birth mothers to lie on the Worksheet, Plaintiffs state: "The Worksheet specifically inquires about whether the baby was conceived with the aid of artificial insemination, intrauterine insemination and/or assisted reproduction technology such as in vitro fertilization[.]" Pls.' Reply at 15. But a mother may truthfully answer Question 37 "yes" and also state that her child was conceived via medically-assisted means, for many women have used such techniques to conceive children that are biologically related to both themselves and their husbands.

Plaintiffs also rely on *Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 350 (Iowa 2013), but not only was that case decided under heightened *state* constitutional scrutiny, it

[1] Plaintiffs also propound a hypothetical scenario: "If the birth mother died before completing the Worksheet, the State would hardly refuse to name her husband as the father of the child because it would then be creating a parentless child." Pls.' Reply at 7. But Plaintiffs cite no authority in the record or in statute or case law for this proposition. If the birth mother is unavailable to complete the worksheet, the local health officer must "prepare a certificate of birth from information secured from any person who has knowledge of the birth" and file it using the Indiana Birth Registration System. Ind. Code § 16-37-2-2(c). And again, any person who "makes false or fraudulent statement in applying . . . for a certified copy of a birth certificate" may be prosecuted for fraud. Ind. Code § 16-37-1-12. In any event, regardless of how the birth certificate is handled in that hypothetical scenario, the mother's husband is presumed the biological father of the child and is charged by law with parental responsibility for that child. The presumption and responsibility are not absolute, as both may be disestablished by legal process, but in no event does the law operate to create a "parentless child."

also addressed a statute that, unlike in Indiana, required the husband's name to be on the birth certificate no matter what. Said the court, "the statute treats married lesbian couples who conceive through artificial insemination using an anonymous sperm donor differently than married opposite-sex couples who conceive a child in the same manner." *Id.* at 352. By contrast, in Indiana, if a birth mother states that her husband is not the father of her child—as she must do in cases of anonymous-donor insemination—her husband will not be listed on that child's birth certificate.

Unlike in *Gartner* or the pauper restriction in *M.L.B.*, which carried implications *only* for the poor as a class, the Indiana parentage laws and Worksheet carry implications for all mothers, married or unmarried, opposite-sex or same-sex. Indeed, 43% of the babies born in Indiana in 2014 were born to unwed mothers. Ind. State Dep't of Health, *Indiana Natality Report 2014: Highlights*, http://www.in.gov/isdh/reports/natality/2014/highlights.htm (last visited Feb. 26, 2016). Just like Plaintiffs, those mothers, regardless of sexual orientation, must answer "no" to Question 37. And even if the relevant universe is only *married* birth mothers, some will be required by law to answer "no" to Question 37. There is thus no congruence between the operational implications of Question 37 and sexual orientation.

2. With respect to the Paternity Presumption Statute, there is no impermissible sex discrimination because there is no implicit elevation of one sex over the other (indeed, the presumption of biological fatherhood operates as much to impose legal burdens as it does to afford benefits) and no effort to codify traditional gender roles. *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (noting that distinctions predicated on "enduring" "[p]hysical differences between men and women" are constitutional so long as they do not "denigrat[e]" either sex or "rely on overbroad generalizations about the different talents, capacities, or

preferences of males and females"). There is only an attempt to account for legitimate biological differences between the sexes—*only* men can be biological fathers, so *only* men should ever be presumed to be such—and such laws survive even heightened scrutiny. *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001) (upholding stricter citizenship requirements for children of citizen fathers than for citizen mothers and noting that "[t]o fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it"). And, insofar as the biological differences between men and women demonstrate there is no cognizable sex discrimination, those differences also provide the rational basis for the statute, which is to allocate a father's parental rights and responsibilities where they most likely belong.

Similarly, as with the allegation of sex discrimination, any same-sex/opposite-sex classification arises from biological differences between opposite-sex and same-sex couples, not from sexual orientation as such. There is no reason to be more suspicious of legitimate biological differentiation in the law just because lesbians and gays are involved. And, again, the parental presumption statute easily survives rational-basis examination, considering that only men can be biological fathers to the children of their wives. Put otherwise: only opposite-sex couples can make babies, which is why the statute exists, so it is not discriminatory for the statute to have an operationally different impact on, and even draw an implicit classification between, opposite-sex and same-sex couples.

IV. The Challenged Statutes Survive Even Strict or Heightened Scrutiny

A. Vesting parental rights based on a biological connection to a child is both uncontroversial and constitutionally proper

As a threshold matter, Plaintiffs dispute the biological basis of Indiana's parentage laws: "The Defendants claim that 'when a child is born in Indiana, that child has two legal parents: a biological mother and a biological father.' This is not true." Pls.' Reply at 6. But Plaintiffs have cited no authority refuting Defendants' supported assertion. *See* Defs.' SJ Br. at 3 (citing many sources of law including *In re Paternity of Infant T.*, 991 N.E.2d 596, 601 (Ind. Ct. App. 2013), *trans. denied*; Ind. Code § 31-9-2-10; *Tarver v. Dix*, 421 N.E.2d 693, 698 n.2 (Ind. Ct. App. 1981); Ind. Code § 31-14-7-1). It should thus be treated as undisputed.

Plaintiffs then take issue with Defendants' contention that it is generally best for children to be raised by their biological parents. Pls.' Reply at 12. But "all states apply a presumption that placement of the child with its natural parent is in the best interests of the child." John Lawrence Hill, *What Does It Mean to Be A "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. Rev. 353, 364 (1991). Indeed, in the absence of that presumption, "every family is at risk from competition from a stranger who wants custody of a child and who can give the child more benefits than the family can." Irma S. Russell, *Within the Best Interests of the Child: The Factor of Parental Status in Custody Disputes Arising from Surrogacy Contracts*, 27 J. Fam. L. 587, 624 (1988–89).

What is more, the Due Process Clause *mandates* a presumption in favor of the rights of biological parents to raise their children. It is "plain beyond the need for multiple citation" that "natural parents" have a "fundamental liberty interest . . . in the care, custody, and management of their child" that is "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 753, 758–59 (1982) (quotation omitted). The State may not sever that interest without "clear and convincing evidence" that doing so is in the child's best interests. *Id.* at 747–48. And the right is of biological—not marital—origin. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony."); *id.* at 652 ("To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." (quotations and citation omitted)); *see also* Hill, *supra*, at 376 (discussing *Stanley* and concluding: "According to the Court, therefore, under the Constitution, a state may not make marriage a sine qua non for ascription of paternal rights.").

Even if a child's natural parents voluntarily relinquish their rights, the *child* may yet have a surviving due process right to be cared for and supported by the child's natural parents. *See Rivera v. Minnich*, 483 U.S. 574, 582 (1987) (noting that the requirement of clear and convincing evidence to support termination of parental rights "protects the parents, *and to some degree the child*, from renewed efforts to sever their familial ties" (emphasis added)); *id.* at 581 (noting that the child has an interest in preventing "an erroneous determination" of paternity). Courts have repeatedly rejected challenges to state laws requiring parents to support their biological children. *See, e.g.*, *id.* at 580 ("the putative father has no legitimate right and certainly no liberty interest in avoiding financial obligations to his natural child that are validly imposed by state law").

For example, in *N.E. v. Hedges*, the Sixth Circuit considered a man's claim that by ordering him to pay to support his biological child, the state of Kentucky had violated his right to substantive due process under the Fourteenth Amendment. 391 F.3d 832, 833–34 (6th Cir. 2004). The panel rejected his claim out of hand, noting "there are no judicial decisions recognizing a constitutional right of a man to terminate his duties of support under state law for a child that he has fathered, no matter how removed he may be emotionally from the child." *Id.* at 836. It cited the historical roots of a biological parent's duty of support: "Child support has long been a tax fathers have had to pay in Western civilization. For reasons of child welfare and social utility, if not for moral reasons, the biological relationship between a father and his offspring—even if unwanted and unacknowledged—remains constitutionally sufficient to support paternity tests and child support requirements." *Id.* And it emphasized the importance of the *biological* connection as the source of the responsibility: "We do not have a system of government like ancient Sparta where male children are taken over early in their lives by the state for military service. The biological parents remain responsible for their welfare. One of the ways the state enforces this duty is through paternity laws." *Id.*

Ultimately, the biological connection between parent and child vests both with a constitutionally protected interest, which means the State cannot conclusively allocate parental rights to non-biological parents without a formal legal determination and due process.

B. Defendants have demonstrated compelling interest and narrow tailoring

In order to effectuate its compelling interest of correctly identifying and recording every child's biological parents, Indiana presumes that a woman's husband is the biological father of her child. However, "that presumption is rebuttable, and what ultimately counts is the husband's actual biological connection to the child (or an adjudication vesting him with parental rights), not merely his marriage to the child's mother."[2] Defs.' SJ Br. at 23.

Plaintiffs suggest that because the presumption does not correctly identify the biological father in every case, the statute is unconstitutional. Pls.' Reply at 27. Achieving 100% accuracy cannot possibly be the standard for a rule allocating parental rights to biological parents. But even if it were, the remedy would be to reject a presumption-based system entirely and require

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[2] Confusingly, Plaintiffs allege: "Under I.C. § 31-14-7-1(1), the Defendants have empowered the birth mother to rebut the rebuttable presumption created by the statute." Pls.' Reply at 7. That allegation is both unsupported and untrue; in fact, as Defendants pointed out in their opening summary judgment brief, documentary evidence such as affidavits and stipulations are insufficient to rebut a presumption of parentage. *See* Defs.' SJ Br. at 3 (citing *Infant T*, 991 N.E.2d at 601); *see also id.* (noting that "clear and convincing evidence" is required to rebut the presumption). Plaintiffs cite no authority, and Defendants are aware of none, supporting the proposition that a married birth mother's answer to Question 37 on the Indiana Birth Worksheet is "clear and convincing evidence" sufficient to rebut the presumption of paternity in her husband.

DNA paternity (and maternity) tests for all births. Such, of course, is not the resolution Plaintiffs demand. Instead, they argue that because the State might *sometimes* presume biological paternity inaccurately, it must instead *always* afford parental rights in a birth mother's female spouse who *cannot possibly be* a biological father.

Plaintiffs' remedy in no way responds to any supposed deficiency in how the State identifies biological parents; instead, it substitutes an entirely new scheme of parental rights laws where biological parentage counts for nothing. Plaintiffs claim that "[a]llowing a same-sex spouse to be named on the birth certificate in no way terminates or impacts the right of the sperm donor to come forward and file suit to be legally recognized as the father of the child." Pls.' Reply at 15. First, of course, whether a person is named on a birth certificate is a distinct matter from whether that person has parental rights, meaning that even if Plaintiff Spouses were listed on birth certificates, that alone would not bestow parental rights on them or terminate the rights of the biological fathers. *See* Defs.' SJ Br. at 31–32. Second, presumably what Plaintiffs mean to suggest is that, even if same-sex spouses are presumed to be parents, biological fathers could still come forward to assert their parental rights. But if so that only undermines the coherence of Plaintiffs' parental rights theory. Automatic termination of a father's rights is exactly the implication of the biology-neutral parental presumption Plaintiffs seek. Establishing legal-status parentage in a birth mother's spouse, regardless of her lack of biological connection to the child, necessarily precludes establishing parentage in another person on the basis of biological connection. The whole point is to substitute legal status for biology.

When an opposite-sex married couple has a child, the husband is presumed be the child's biological father; if a putative father files a paternity action to establish parental rights to that child, the success of that action depends upon the putative father's ability to demonstrate that he—and not the husband—is the child's biological father. If the same scenario arises in the context of a same-sex couple, however, the non-birth-mother spouse could not be presumed to be the child's biological father because that is impossible. If the spouse were given the benefit of the statutory presumption, it would be on legal grounds, not biological. A legal presumption is rebuttable with contrary legal evidence (such as proof of no marriage), while a biological presumption is rebuttable by contrary biological evidence (such as a DNA test). Marital status is not disproven by another's biological connection, and a biological connection is not disproven by another's marital status.

To make matters even more confusing, Jackie Phillips-Stackman has raised the fact of her biological maternity as an additional reason why she should be the presumed mother of L.J.P.-S. and why it is inappropriate for her to seek to adopt the child. Phillips-Stackman Affidavit at 4. To be clear, in the State's view, for both Jackie and Lisa to have parental rights to L.J.P.-S., Jackie must file a maternity action and establish her biological maternity, thereby indirectly disestablishing Lisa's biological maternity. *In re Paternity & Maternity of Infant R.*, 922 N.E.2d 59, 61–62 (Ind. Ct. App. 2010) (construing Ind. Code § 31-14-4-1 to permit putative mother to file maternity action). Then Lisa may file an adoption petition. Ind. Code § 31–19–15–2 (permitting a person married to a child's biological parent to adopt the child without affecting the biological parent's rights). But Jackie wants to be a presumed parent based on her biological connection, while other Plaintiffs wish to be presumed parents based on their status as spouses of birth mothers, regardless whether either is biologically connected to the child. These divergent bases for demanding parental rights cannot be reconciled and underscore the confusion inherent in the new system Plaintiffs seek to impose.

It is also unclear how the burden of proof would work under Plaintiffs' parental rights scheme in the event a putative father came forward to challenge the statutory presumption of legal parentage in a birth mother's same-sex spouse. In the opposite-sex context, the burden rests on the putative father to demonstrate his biological paternity. *Humbert v. Smith*, 655 N.E.2d 602, 605 (Ind. Ct. App. 1995) ("Paternity actions are civil proceedings and the alleged father must be proved to be such by a preponderance of the evidence.") *aff'd* 664 N.E.2d 356 (Ind. 1996). But in the same-sex context, assuming there is no technical legal flaw with the presumption (such as lack of an actual marriage), Plaintiffs would presumably contend that the paternity court would have to allocate parental rights based upon the best interests of the child. That would essentially require the biological father to prove his parental fitness—in fact, his *superiority*—in order to obtain parental rights to his biological child. Such a standard has no parallel in Indiana's current system, which merely requires a putative father to prove biological fatherhood, not superior parental fitness. It also is likely precluded by the Fourteenth Amendment, which protects the parental rights of biological parents. *See supra* IV.A.

An essentially irrebuttable presumption of legal parenthood for a non-biological parent in a same-sex marriage would also have "not merely *disproportionate*" effects, but rather "different consequences on two categories of persons." *M.L.B.*, 519 U.S. at 127. Consider: a man who is not biologically related to his wife's child would have parental rights through the presumption, but those rights could be destroyed if biological paternity were established in another man. But a woman who is not biologically related to her wife's child would have parental rights through the presumption without any such vulnerability, and the rights of the biological father would be extinguished without benefit of notice or hearing. It is Plaintiffs' proposed alternative—not the Paternity Presumption Statute—that threatens constitutional rights.

Plaintiffs seem to prefer a system of parental rights akin to indeterminate estates in property, where a person with a minimally sufficient claim is treated as the owner until someone with a better claim comes along. Pls.' Reply at 15 ("The non-biological same-sex parent on the birth certificate could always be challenged by a man with a biological claim to the child, just as is done when the non-biological parent is a husband."). Parental rights do not work that way under the Anglo-American legal system. Parental rights and obligations begin with the two people responsible for creating the child, to be overridden only when doing so is in the best interests of the child. It seems very likely that these Plaintiffs can meet that standard, but that is all the more reason to adhere to it rather than dispense with it in favor of an untried system favoring the first to assert a claim of right.

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Plaintiffs admit their new path to parental rights would apply *only* to women, for "[w]hen the situation involves a surrogate and two men, that is a class that falls completely outside the class of persons of which Plaintiffs are members. As neither of the gay men are married to the birth mother, the presumption of parenthood does not arise under I.C. § 31-14-7-1(1)." Pls.' Reply at 12. In sum: Plaintiffs reject parental rights based on biological connections (except for Jackie Phillips-Stackman); insist that parental rights must instead devolve on birth mothers and their spouses; and ultimately refuse to take account of how the law would treat male same-sex couples. Yet Plaintiffs make no attempt to explain how their parental rights paradigm is either more equitable or constitutionally sound than the existing age-old system that proceeds from biological parent-child relationships. The Court should reject their attempt to impose this ad hoc alternative system on the State.

CONCLUSION

The Court should grant summary judgment for all Defendants and against Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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